Supreme Court, U.S.
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No. 94-2105

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

HAROLD E. ADAMSON, et. al.,

Petitioners,

vs.

ARMCO INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit correctly affirmed the District Court's dismissal of petitioners' claims for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) on the ground that those claims are barred by a two year statute of limitations borrowed from Minnesota's wage claim statute.

2. Whether the Court of Appeals for the Eighth Circuit correctly affirmed the District Court's dismissal of petitioners' claims for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) on the ground that petitioners lacked standing to sue as "participants" or "beneficiaries" because their benefit claims were time-barred.

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BRIEF IN OPPOSITION

Respondent Armco Inc. ("Armco") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's decision in *Adamson, et al. v. Armco Inc.*, 44 F.3d 650 (8th Cir. 1995).1/ Petitioners did not raise below the two questions that they present for review regarding the appropriate statute of limitations for benefit claims under the Employee Retirement Income Security Act ("ERISA"). These questions are thus not properly before this Court. Moreover,

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1/ Pursuant to Supreme Court Rule 29.1, respondent states that it has no parent companies or subsidiaries that are not wholly owned.

the courts of appeals that have considered these issues have uniformly rejected petitioners' suggested approach, a result wholly consistent with the decisions of this Court. The third question, concerning petitioners' standing to assert ERISA breach of fiduciary duty claims, is a narrow question that is neither recurring nor important. Because there is a dearth of circuit court precedent on point, and because there is no reason to believe that other courts of appeals will disagree with the Eighth Circuit, this issue is not appropriate for review on a writ of certiorari.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, Armco draws the Court's attention to certain relevant factual errors and omissions in the petition.

I.

FACTUAL BACKGROUND

Reserve Mining Company ("Reserve") owned and operated iron ore mining facilities in northern Minnesota from 1939 until it filed for bankruptcy in August 1986. At that time, Reserve suspended its operations and stopped providing employee benefits due under Reserve's benefit plans.

Respondents were salaried employees and retired employees of Reserve at the time it ceased operations in 1986. Respondents seek benefits allegedly due under

Reserve's benefit plans.[2/] They assert corporate veil piercing theories in an effort to hold Armco liable for the payment of those benefits.[3/]

Although petitioners knew in August 1986 that their welfare benefits had ceased, they did not file their lawsuit against Armco until July 1992, almost six years later. Petitioners try to excuse this lengthy delay by implying that it was difficult to discover the facts underlying their claims. Pet. 6-8. No such difficulty, however, prevented the United Steelworkers of America from filing a lawsuit against Armco in 1988, alleging that Armco was liable to the union and its members for Reserve's obligations under the hourly pension plan. Significantly, the attorney that represented the United Steelworkers of America in that lawsuit is the same attorney that represents petitioners. Petitioners' argument that they did not know of Armco's involvement in Reserve also belies common sense. Armco had a widely known ownership interest in Reserve since Reserve was formed in the 1950's. Some of the petitioners were Reserve officers and members of the committees that controlled Reserve's ERISA plans,

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2/ Petitioners erroneously allege that for "purposes of this petition" Armco "has conceded" that the petitioners' benefits are "vested." Pet. 5, 21. Armco has not made such a concession.

3/ Before 1983, Reserve was organized as a corporation. Armco and Republic Steel Corporation ("Republic") each owned fifty percent of its stock. On December 31, 1982, Reserve's assets were transferred to a partnership called Reserve Mining Company. This partnership had two equal partners -- First Taconite Company (a wholly-owned corporate subsidiary of Armco) and Republic-Reserve, Inc. (a wholly-owned corporate subsidiary of Republic). LTV Corporation later acquired Republic.

and therefore must have known of Armco. In any event, this disputed factual issue is not called into question by the petition for a writ of certiorari.[4/]

II.

PROCEDURAL HISTORY

Petitioners' original Complaint alleged benefit claims under ERISA § 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1132(a)(1)(B), (a)(3), claims for breaches of fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, and claims for breaches of co-fiduciary duty under ERISA § 405, 29 U.S.C. § 1105.[5/]

In response to Armco's motion, the District Court dismissed petitioners' benefit claims with prejudice on the ground that they were time-barred. Recognizing that

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4/ The District Court concluded that even if petitioners did not know of Armco, they knew that their benefits had stopped, triggering a potential claim against the fiduciary, Reserve. Pet. App. A-22 - A-23. After learning thereof, they had an obligation to investigate their options and consider whether they had viable claims against anyone else, including alleged alter egos. As the District Court stated, petitioners cannot be permitted to "wait to file a lawsuit until such time as they happened to stumble upon facts suggesting an alter ego relationship between the fiduciary and another company." *Id.* A-23.

5/ Petitioners erroneously claim that Armco dominated and controlled Reserve and that Armco is thus liable for their benefits under an alter ego theory. Pet. 6-7. Armco strongly disagrees with this contention, and specifically contests petitioners' claim that *Minnesota Power v. Armco Inc.*, 937 F.2d 1363 (8th Cir. 1991) put this issue to rest. *Minnesota Power* turned upon a unique set of facts that are not present in this case. Neither the District Court nor the Eighth Circuit reached petitioners' alter ego claims due to their dismissal of the lawsuit on other grounds.

ERISA provided no statute of limitations for ERISA benefit claims, the District Court concluded that it should adopt the most analogous state statute of limitations. Pet. App. A-15. It ultimately held that the Minnesota law most analogous to those claims was the two-year wage claim statute of limitations found in Minn. Stat. § 541.07(5), a conclusion previously reached by two other Minnesota federal district courts. *Id.* A-16 - A–17. Petitioners' ERISA benefit claims were therefore time-barred. The District Court also dismissed all breach of fiduciary duty claims premised upon Armco's alleged liability as Reserve's alter ego,[6/] but permitted petitioners to replead breach of fiduciary duty claims premised upon Armco's alleged independent fiduciary status. *Id.* A-17 - A-24.[7/]

Petitioners' First Amended Complaint alleged causes of action for breach of fiduciary duty, breach of co-fiduciary duty, and for equitable relief under ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2), (a)(3). In

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6/ The District Court applied 29 U.S.C. § 1113, which requires breach of fiduciary duty claims to be brought within six years of the breach or three years from the date plaintiff had actual knowledge of the breach, whichever is shorter. 29 U.S.C. § 1113. Because respondents' claims were based upon the assertion that Armco, as Reserve's alleged alter ego, was liable for Reserve's breach of fiduciary duty, the District Court found that respondents had actual knowledge of the alleged breach in 1986, and that these claims were therefore time-barred. *Id.* A-17 - A-23.

7/ Petitioners wrongly imply that the District Court concluded that these independent fiduciary claims would not be barred by ERISA's breach of fiduciary duty statute of limitations. Pet. 9. More precisely, the District Court concluded that petitioners had to have actual knowledge of Armco's alleged fiduciary status for their independent fiduciary claims to accrue. The District Court concluded that a determination of that issue could not be made on a Rule 12(b)(6) motion to dismiss. *Id.* A-24.

response to Armco's renewed motion to dismiss, the District Court dismissed these claims with prejudice and entered judgment for Armco. The Court concluded that petitioners did not have standing because they did not have a "colorable claim to vested benefits." Pet. App. A-31 - A-34. They did not have a "colorable claim to vested benefits," according to the District Court, because their ERISA benefit claims were time-barred. *Id.*

The Court of Appeals for the Eighth Circuit affirmed the District Court's orders in their entirety, agreeing with the lower court's reasoning in every respect. Since ERISA did not provide a statute of limitations for benefit claims, the Court of Appeals concluded that it must select the most analogous state statute of limitations. *Id.* A-3. It noted that in the Eighth Circuit, ERISA benefit claims are characterized as contract actions. *Id.* This was not, however, the end of the inquiry, since the Court was presented with more than one contract statute of limitations -- a general contract statute and a statute governing claims for wages and benefits. *Id.* The Court therefore had to decide which statute governed claims most analogous to ERISA benefit claims. *Id.* The Eighth Circuit selected the Minnesota wage claim statute, concluding it was more analogous than the general contract statute. *Id.* at A–4 - A–6.[2/]

[2/] The Eighth Circuit carefully analyzed Minnesota case law and found that Minnesota courts would apply the wage claim statute of limitations to claims for employee benefits. *Id.* at A-4. The Court of Appeals found further support for the application of the wage claim statute in the "plain meaning" of that statute, and the principle that the more specific of two statutes of limitations should govern. *Id.*

The Eighth Circuit also confirmed that petitioners did not have standing to assert breach of fiduciary duty claims. The Circuit Court pointed out that only "participants" or "beneficiaries" may bring such actions under ERISA. In determining whether petitioners were "participants" or "beneficiaries," the Eighth Circuit looked to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989). In that opinion, this Court held that to be considered a "participant," a former employee must have "a colorable claim to vested benefits." The Eighth Circuit ruled that petitioners did not have a colorable claim to vested benefits because their benefit claims were time-barred. Pet. App. A-8. They thus had no standing. *Id.* The Eighth Circuit noted that it had established an exception to this rule which applied if the fiduciary's breach of duty deprived plaintiff of participant status, but not if claimants lost participant status as a result of their own actions.[2/] *Id.* at A-8 - A-9.

2/ This exception was established by the Eighth Circuit in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3771 (U.S. Apr. 24, 1995). This Court has granted certiorari in *Howe* to consider whether plan participants may obtain reinstatement of their retiree health insurance and restitution for unpaid benefits under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), or whether relief under that section can inure only to the plan. Although petitioners try to emphasize this aspect of *Howe* (*see* Pet. 11, 23-24), it has no bearing upon their petition. The Eighth Circuit dismissed petitioners' claims because they were not participants and thus lacked standing. The Court of Appeals relied upon *Howe* only to establish that there was an exception that applied if the fiduciary's breach of duty deprived plaintiff of participant status. The Court of Appeals did not base its decision upon, nor did it even discuss, the question in *Howe* which is under consideration by this Court. Petitioners themselves admit that the Court of Appeals did not address petitioners' entitlement to equitable relief under ERISA § 502(a)(3), the question presented in *Howe*. Pet. 11.

Since petitioners lost their status because they allowed their benefit claims to become time-barred, the exception did not apply.10/

REASONS FOR DENYING THE PETITION

I.

PETITIONERS' ARGUMENT THAT ERISA'S BREACH OF FIDUCIARY DUTY STATUTE OF LIMITATIONS SHOULD BE APPLIED TO ERISA BENEFIT CLAIMS IS NOT PROPERLY BEFORE THIS COURT, AND IS CONTRARY TO THE UNIFORM CONCLUSION AMONG THE COURTS OF APPEALS THAT THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS SHOULD BE APPLIED.

A. Because Petitioners Did Not Raise This Argument Below, And, In Fact, Asserted That The Most Analogous State Statute Of Limitations Should be Applied, This Question Is Not Properly Before This Court.

In both the District Court and the Court of Appeals, petitioners affirmatively asserted that ERISA

10/ As petitioners pointed out, there is some disagreement among the circuits as to whether this exception should exist. Pet. 11, n.3. Petitioners, however, have not sought review on this question, agreeing with the Eighth Circuit that the exception exists. They have chosen instead to challenge the Court of Appeals' ruling that the exception does not apply to petitioners under the unique facts of this case. Petitioners complain, for example, that the Court of Appeals did not address whether Armco's conduct triggered the exception. Pet. 11. In fact, the Eighth Circuit specifically concluded that petitioners were responsible for losing their participant status through inaction. Pet. App. A-9.

§ 502(a)(1)(B) benefit claims are governed by the most analogous state statute of limitations.[11] They thus proposed two Minnesota state statutes of limitations as alternatives to the wage claim statute ultimately adopted below.[12] Petitioners now abandon this position. In their petition, they directly contradict their prior legal arguments and assert for the first time that ERISA benefit claims should be governed by the statute of limitations for breach of fiduciary duty, ERISA § 413(a), 29 U.S.C. § 1113(a), not by the most analogous state statute of limitations.

Because petitioners never argued to either the District Court or the Court of Appeals that the ERISA breach of fiduciary duty statute of limitations should apply to their ERISA benefit claims, the lower courts did not decide that question. That issue, therefore, is not properly before this Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Only in "exceptional cases" does the Court review a question not raised below, *Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958). This is not such a case. Indeed, this principle should apply with even greater force here since petitioners

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11/ *See* Memorandum in Opposition to Defendant's Motion to Dismiss at 3; Brief of the Appellants Harold E. Adamson, et al. at 13.

12/ Petitioners advocated the adoption of either Minnesota's general statute of limitations for contract claims, Minn. Stat. § 541.05, subd. 1(1), or the statute of limitations applicable to liabilities created by statute, Minn. Stat. § 541.05, subd. 1(2).

advocated precisely the opposite position before the lower courts.

B. There Is Uniform Agreement Among The Courts of Appeals That The Most Analogous State Statute Of Limitations Should Be Applied To ERISA § 502(a)(1)(B) Benefit Claims.

The courts of appeals uniformly agree that since ERISA does not contain a statute of limitations applicable to ERISA § 502(a)(1)(B) benefit claims, courts should apply the most analogous state statute of limitations. *See Flanagan v. Inland Empire Electrical Workers Pension Plan & Trust*, 3 F.3d 1246, 1252 (9th Cir. 1993); *Meade v. Pension Appeals and Review Comm.*, 966 F.2d 190, 194-95 (6th Cir. 1992); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1180 (3rd Cir. 1992); *Kennedy v. Electricians Pension Plan, IBEW #995*, 954 F.2d 1116, 1120 (5th Cir. 1992); *Wright v. Southwestern Bell Telephone Co.*, 925 F.2d 1288, 1291 (10th Cir. 1991); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1242 (11th Cir. 1989); *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975, 981 (4th Cir. 1987); *Jenkins v. Local 705 Int'l Broth. of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983); *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983).[13/]

13/ Armco is unaware of any First Circuit decisions discussing the statute of limitations applicable to ERISA § 502(a)(1)(B) benefit claims. A district court within that circuit has, however, followed the uniform rule. *See Teamsters Local 251 v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 251*, 689 F. Supp. 48, 49 (D.R.I. 1988).

The courts of appeals that have specifically considered whether to apply ERISA's breach of fiduciary duty statute of limitations to ERISA benefit claims have consistently refused to do so. In *Flanagan v. Inland Empire Electrical Workers Pension Plan & Trust*, 3 F.3d 1246 (9th Cir. 1993), the Ninth Circuit concluded that the state contract statute provided a closer analogy than ERISA's breach of fiduciary duty statute. 3 F.3d at 1252. In *Kennedy v. Electricians Pension Plan, IBEW #995*, 954 F.2d 1116 (5th Cir. 1992), the Fifth Circuit found that Congress limited the application of ERISA § 413(a) to suits claiming breach of an ERISA trustee's fiduciary duty. 954 F.2d at 1120.

Contrary to petitioners' implication, the Tenth and Third Circuits follow the uniform rule. Petitioners claim that in *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1990), the Tenth Circuit indicated that it might wish to consider whether ERISA benefit claims should be governed by ERISA's breach of fiduciary duty statute of limitations. Pet. 16. The Court of Appeals in *Held*, however, followed *Wyoming Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co.*, 850 F.2d 613, 618 n.8 (10th Cir. 1988), applying the most analogous state statute of limitations and rejecting the statute of limitations contained in ERISA § 413(a). 912 F.2d at 1201-02. The Tenth Circuit has since reaffirmed this position. *Wright v. Southwestern Bell Telephone Co.*, 925 F.2d 1288, 1290-91 (10th Cir. 1991).

The Third Circuit also applies the most analogous state statute of limitations to ERISA benefit claims. The two Third Circuit cases cited by petitioners, *Adams v. Gould Inc.*, 739 F.2d 858 (3rd Cir. 1984), *cert. denied*, 469

U.S. 1122 (1985) and *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52 (3rd Cir.), *cert. denied*, 474 U.S. 843 (1985), are not apposite. *Adams* was not an ERISA lawsuit. It was a *Vaca v. Sipes* action involving claims against plaintiff's union for breach of the duty of fair representation and against plaintiff's employer for breach of the collective bargaining agreement. 739 F.2d at 864-67. *See Vaca v. Sipes*, 386 U.S. 171 (1967). Although *Edwards* was an ERISA action, it involved breach of fiduciary duty claims, not benefit claims, and thus called for the application of ERISA's breach of fiduciary duty statute of limitations. 757 F.2d at 54-56. When faced with ERISA benefit claims, the Third Circuit has consistently applied the most analogous state statute of limitations. *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1180 (3rd Cir. 1992); *Vernau v. Vic's Market, Inc.*, 896 F.2d 43, 45 (3rd Cir. 1990); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. John Tinney Delivery Service, Inc.*, 732 F.2d 319, 322 (3rd Cir. 1984).[14/]

C. Where, As Here, Congress Has Not Provided A Statute Of Limitations, This Court Should Apply The Usual Rule And Conclude That ERISA Benefit Claims Are Governed By The Most Analogous State Statute Of Limitations.

This Court very recently considered whether a federal action that has no express limitations period should be governed by a state statute of limitations or a statute borrowed from another federal act. *North Star*

14/ Petitioners have acknowledged that these cases, which are directly on point, make no mention of either *Edwards* or *Adams*. Pet. 18-19 n.7.

Steel Co. v. Thomas, __ U.S. __, 63 U.S.L.W. 4465 (May 30, 1995) (considering the statute of limitations applicable to a claim under the Worker Adjustment and Retraining Notification Act ("WARN")). The Court adopted the most analogous state statute. 63 U.S.L.W. at 4467. In explaining its reasoning, the Court emphasized the presumption in favor of adopting state statutes of limitation where Congress has failed to provide a limitations period. 63 U.S.L.W. at 4466-67.

North Star Steel referred to many of the Court's prior statements advocating the adoption of the most analogous state statute of limitations. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), for example, this Court stated that "[i]t is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand." 501 U.S. at 355. Because the practice of borrowing state law is "longstanding," and because Congress is presumed to be aware of this practice, this Court has said that it "can generally assume that Congress intends by its silence that we borrow state law." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 147 (1987). *See North Star Steel*, 63 U.S.L.W. at 4467.

"Rooted as it is in the expectations of Congress, the 'state-borrowing doctrine' may not be lightly abandoned." *Lampf*, 501 U.S. at 356. This Court has recognized a "closely circumscribed" and "narrow exception" to this general rule, but this exception applies only if the state limitations period frustrates or interferes with the purpose of the federal law. *North Star Steel*, 63 U.S.L.W. at 4467. The two year statute of limitations period adopted by the

Eighth Circuit does not frustrate the policies underlying ERISA. As the Court of Appeals concluded, the two year period affords plaintiffs "a realistic opportunity to assert ERISA benefit claims" and is thus not "at odds with federal policy." Pet. App. A-5, A-6. *See North Star Steel*, 63 U.S.L.W. at 4467 (finding that a two year period is not too short under WARN). As noted above, petitioners here knew or should have known of their claims well within two years of the cessation of benefits. *See supra* at 3-4.

Petitioners make no meaningful argument that the two year statute of limitations is contrary to federal policy.[15/] Instead, they attempt to apply the "hierarchical inquiry" found in *Lampf*. Pet. 12-16. It is unclear whether the *Lampf* methodology is still viable.[16/]

15/ Petitioners make a passing reference to federal policy in just two footnotes. Pet. 14, nn. 4, 5. In footnote 4, they criticize the Eighth Circuit for not adequately considering whether the two year statute is consistent with federal policy. As noted in the text above, however, the Eighth Circuit carefully considered this issue. In footnote 5, petitioners claim that both *Robbins v. Iowa Road Builders Co.*, 828 F.2d 1348 (8th Cir. 1987), *cert. denied sub nom. Robbins v. Easter Enterprises, Inc.*, 487 U.S. 1234 (1988) and *Trustees of Health Benefits Trust v. Lillard & Clark*, 780 F. Supp. 738 (D. Colo. 1990) rejected two year statutes because they hindered federal policy underlying ERISA. The Eighth Circuit itself corrected petitioners' mistaken impression of *Robbins* in its opinion below. Pet. App. A-5. As for *Lillard & Clark*, the court rejected the proposed two year statute primarily because it was hostile to and discriminated against claims based on federal law. 780 F. Supp. at 741.

16/ The *Lampf* "hierarchical inquiry" was supported by only four justices. Justice Scalia concurred in the judgment, but rejected the methodology adopted by the Court. 501 U.S. at 364-66. The Court's latest pronouncement on the issue in *North Star Steel* did not cite or apply the *Lampf* methodology.

Even if it is, petitioners' effort to fit themselves within the *Lampf* hierarchy fails.

The first *Lampf* factor asks whether a uniform statute of limitations should be selected. This factor focuses on whether the federal action encompasses "numerous and diverse" topics "such that a single state limitations period may not be consistently applied within a jurisdiction . . . ." 501 U.S. at 357, *quoting Wilson v. Garcia*, 471 U.S. 261, 273-75 (1985) (emphasis added). The concern is upon the need for "uniformity within each State." *Wilson v. Garcia*, 471 U.S. at 275. ERISA does not encompass "numerous and diverse" topics that would lead to the application of multiple statutes of limitation to the same type of claims. Once a state statute has been selected, it will apply to all such ERISA claims raised within that state.12/ *Wilson v. Garcia*, in stark contrast, involved § 1983 actions, claims that could be based upon a large variety of factual scenarios, thus opening the door to the application of "different statutes of limitations . . . to the various § 1983 claims arising in the same State." *Id.* at 274. Unlike *Wilson v. Garcia*, the facts upon which ERISA benefit claims are based are sharply circumscribed, and will not lead courts to apply multiple statutes of limitation within a state.

In an effort to satisfy this first *Lampf* factor, petitioners argue that the Eighth Circuit has applied different state statutes of limitations in different

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12/ Petitioners concede that there is uniform agreement among the courts of appeals that an ERISA § 502(a)(1)(B) claim for benefits should be characterized as a contract action. *See* Pet. 17-19. As the Eighth Circuit made clear, the wage claim statute that it selected was a specific type of contract statute of limitations. Pet. App. A-3.

circumstances. Pet. A-12 - A-14. Petitioners, however, fail to recognize that the Eighth Circuit has never applied multiple state limitations periods within a jurisdiction. Although both *Johnson v. State Mutual Life Assurance Co. of America*, 942 F.2d 1260 (8th Cir. 1991) and *Fogerty v. Metropolitan Life Ins. Co.*, 850 F.2d 430 (8th Cir. 1988) dealt with ERISA benefit claims in Missouri, *Johnson* did not add a second statute of limitations that could be applied to those claims. Instead, it overruled *Fogerty* and adopted a new Missouri statute applicable to all ERISA benefit claims, ruling that it had previously misapplied Missouri law. 942 F.2d at 1266. Petitioners next argue that the Eighth Circuit's decision in this case is inconsistent with its decision concerning Iowa law in *Robbins v. Iowa Road Builders Co.*, 828 F.2d 1348 (8th Cir. 1987), *cert. denied sub nom. Robbins v. Easter Enterprises, Inc.*, 487 U.S. 1234 (1988). Pet. A-13 - A-14. The Eighth Circuit, however, concluded that these opinions are in perfect harmony. Pet. App. A-5.[18/] Even if they were inconsistent, the Eighth Circuit still applied only one state statute of limitation for every state in which an ERISA benefits claim arose. There is therefore no justification for

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18/ The Eighth Circuit noted that *Robbins* involved an ERISA trustee's suit to collect delinquent plan contributions. Pet. App. A-5. The Circuit Court pointed out that such a suit "is not analogous to an employee's claim for benefits that are part of his or her total compensation." *Id.* Trustees may not know of the employer's breach for years. *Id.* Employees, in contrast, will immediately realize that the employer has failed to pay particular employment benefits. *Id.* Thus, while the wage claim statute of limitations was not appropriate in *Robbins*, it was highly appropriate in this matter. Any doubt about any inconsistency between this case and *Robbins* was resolved below, when the Eighth Circuit denied petitioners' suggestion for rehearing en banc.

concluding under *Lampf* that a uniform statute of limitations should be selected.

If the first *Lampf* factor is not satisfied, the inquiry ends. Even if it continued, petitioners cannot demonstrate that the uniform period should be derived from a federal source, the second *Lampf* factor. In *Lampf*, this Court stated that in making this judgment, the court should "accord particular weight to the geographic character of the claim . . . ." 501 U.S. at 357. Petitioners' argument with respect to this factor focuses almost exclusively upon the "danger" of forum shopping. Pet. 14-15. *North Star Steel*, however, stated that forum shopping was not a relevant consideration. 63 U.S.L.W. at 4467. Courts should instead consider whether the claim involves interstate transactions. *Id.* In ERISA benefit actions, as in the WARN actions at issue in *North Star Steel*, the claims usually involve single companies whose employees are affected in one state. There are no interstate transactions involving acts in several states, distinguishing ERISA § 502(a)(1)(B) causes of action from other actions that may require a uniform statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987) (noting that the predicate acts required to demonstrate a RICO claim will often occur in several states).

Finally, the third *Lampf* factor requires a determination whether an analogous federal source affords a "closer fit" with ERISA benefit actions than the state statute at issue. As noted above, several courts of appeals have concluded that ERISA's breach of fiduciary duty statute of limitations is limited to breach of fiduciary duty claims. *Flanagan v. Inland Empire Electrical Workers*

Pension Plan & Trust, 3 F.3d 1246 (9th Cir. 1993); *Kennedy v. Electricians Pension Plan, IBEW #995*, 954 F.2d 1116 (5th Cir. 1992). Claims against trustees for breach of fiduciary duty, the actions governed by ERISA § 413(a), encompass factual scenarios far removed from employee claims for benefits. State wage claim statutes of limitation, in contrast, apply to employee claims for remuneration, precisely the type of action involved in an ERISA § 502(a)(1)(B) claim. Accordingly, this *Lampf* factor also does not favor the adoption of ERISA's breach of fiduciary duty statute of limitations.

II.

PETITIONERS' ARGUMENT THAT THE STATE'S "RESIDUAL" OR GENERAL CONTRACT STATUTE OF LIMITATIONS SHOULD BE APPLIED TO ERISA BENEFIT CLAIMS IS NOT PROPERLY BEFORE THIS COURT, DOES NOT ARISE OUT OF A CONFLICT AMONG THE CIRCUITS, AND IS NOT SUPPORTED BY APPLICABLE LAW.

A. Because Petitioners Did Not Raise This Argument Below, This Question Is Not Properly Before This Court.

Petitioners' assertion that the state's "residual" or general contract statute of limitations should be uniformly applied to ERISA benefit claims, like petitioners' assertion urging adoption of ERISA's breach of fiduciary duty statute of limitations, was neither argued to nor considered by either the District Court or the Court of Appeals. Petitioners merely asserted below that ERISA benefit

claims are governed by the most analogous state statute of limitations, and proposed two Minnesota state statutes of limitations as alternatives to the statute adopted below.[19] Petitioners now abandon this position. In their petition, they assert for the first time that ERISA § 502(a)(1)(B) benefit claims should be governed by the state's "residual" or general contract statute of limitations, not by the most analogous state statute of limitations.[20] Because petitioners did not address this argument to either the District Court or the Court of Appeals, it is not properly before this Court. *See supra* at 9-10.

B. No Court of Appeals Decisions Support The Uniform Adoption Of A "Residual" Or General Contract Statute Of Limitations.

As noted above, every court of appeals which has considered which statute of limitations to apply to ERISA § 502(a)(1)(B) benefit claims has applied the most analogous state statute. *See supra* at 10. No court of appeals has imposed a rule requiring the adoption of a state's "residual" or general contract statute of limitations.

Although the circuit courts are therefore in agreement on this issue, petitioners argue that there is a split among the circuits, stating that most courts of appeals have characterized ERISA benefit claims as contract actions, while the Third, Eleventh and Eighth Circuits

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19/ *See supra* at n.12.

20/ Petitioners themselves concede that one of the state statutes it advocated, Minn. Stat. § 541.05, subd. 1(2), is not properly considered a "residual" statute of limitations. Pet. 19, n.8.

have looked instead to state wage claim statutes. The adoption of different state statutes by the courts of appeals, of course, does not reflect a split among the circuits. It is merely a natural outgrowth of this Court's admonition that where there is no federal statute of limitations, courts should chose the most analogous state statute.

The circuit court decisions, moreover, are in harmony. In each case, the courts of appeals considered which state statute was most analogous to an ERISA claim for benefits and adopted the most appropriate contract statute of limitations. Where there was only one contract statute of limitation available, the courts borrowed that statute. *See, e.g., Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975 (4th Cir. 1987); *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983). Where there was more than one contract statute of limitations available, the courts selected the most closely analogous. In many cases, that happened to be the contract statute applicable to actions on written contracts.[21/] *See, e.g., Meade v. Pension Appeals and Review Comm.*, 966 F.2d 190, 194-95 (6th Cir. 1992); *Jenkins v. Local 705 Int'l Broth. of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). When given the opportunity to choose even more specific contract statutes applicable to actions for wages, those statutes were

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21/ Petitioners can hardly contend that these statutes of limitation are "residual" or general contract statute of limitations.

selected.[22] *See Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989);[23] *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. John Tinney Delivery Service, Inc.*, 732 F.2d 319 (3rd Cir. 1984).[24]

Petitioners try to demonstrate that there is a conflict within the Eighth Circuit by arguing that the court used Iowa's general contract statute of limitations in *Robbins v. Iowa Road Builders Co.*, 828 F.2d 1348 (8th Cir. 1987), *cert. denied sub nom. Robbins v. Easter Enterprises, Inc.*, 487 U.S. 1234 (1988), but rejected Missouri's general residual statute in *Johnson v. State Mutual Life Assurance*

22/ The courts of appeals which have adopted the general contract statutes of limitation or the statute applicable to written contracts were not given the choice of selecting a more specific wage claim statute of limitations. If they had been given that choice, they would have undoubtedly chosen the wage claim statute. A wage claim is, after all, a specific type of contract action closely analogous to an ERISA benefit claim. Choosing a more specific and more analogous statute of limitations where that option is presented is consistent with choosing the general contract statute where no such option exists.

23/ Petitioners point out that the Eleventh Circuit in *Clark* applied the wage claim statute, instead of the more general statute governing actions upon written contracts, to an ERISA claim for past wages. Pet. 19. In the same case, the court of appeals applied to plaintiff's equitable claim for reinstatement a statute governing the equitable enforcement of statutory rights. 865 F.2d at 1242. In both instances, the court applied the most analogous state statute to plaintiff's ERISA claims.

24/ Petitioners erroneously allege that the Third Circuit "noted" in *Vernau v. Vic's Market, Inc.*, 896 F.2d 43 (3rd Cir. 1990) that this issue should perhaps be reconsidered. Pet. 18. *Vernau* merely expressed, in a footnote, one judge's opinion that the court "may wish" to reconsider *Tinney*. *Vernau*, 896 F.2d at 45, n.3. *Vernau*, in fact, applied *Tinney* to the facts in that case. It should also be noted that one of the *Tinney* panel members, the Honorable Joseph F. Weis, Jr., Senior Circuit Judge of the Third Circuit, sat by designation in the Eighth Circuit panel below.

Co. of America, 942 F.2d 1260 (8th Cir. 1991). Pet. 19-20. As an initial matter, the court in *Robbins* chose the statute of limitations applicable to actions for breach of written contracts, not some "residual" or general statute. 828 F.2d at 1355. More importantly, both cases merely represented the court's application of the general rule requiring it to choose the most analogous state statute.

C. This Court Should Not Require The Uniform Adoption Of General Or Residual Contract Statutes Of Limitations.

In *North Star Steel*, this Court emphasized the strong presumption in favor of adopting the most analogous state statutes of limitations where Congress has failed to provide a limitations period. *North Star Steel*, 63 U.S.L.W. at 4466-67. There is no justification for departing from that established practice here.

"Catch all" or residual statutes have been adopted only in very limited circumstances to resolve problems not present in this case. *Owens v. Okure*, 488 U.S. 235 (1989), one of the two cases relied upon by petitioners, grew out of a problem first addressed in *Wilson v. Garcia*, 471 U.S. 261 (1985). In *Wilson*, this Court confronted the "conflict, confusion, and uncertainty" regarding the statute of limitations governing § 1983 actions. *Id.* at 266. That conflict had arisen because almost every § 1983 action could be analogized to more than one common-law form of action. *Id.* at 272-73. In addition, § 1983 claims encompassed "numerous and diverse topics and subtopics . . . ." *Id.* at 273. As a result, different statutes of limitations were being applied to various § 1983 actions arising in the same state.

Id. at 274. To obtain "uniformity within each State," the Court held that personal injury statutes of limitations should be uniformly applied to all § 1983 claims. *Id.* at 275, 276. This, however, did not resolve the problem. Many states had numerous personal injury statutes of limitations, leading to continued confusion and inconsistency within states. This Court therefore held in *Owens* that courts should borrow the "residual or general" personal injury statutes of limitations for § 1983 actions.

Reed v. United Transportation Union, 488 U.S. 319 (1989) followed closely on the heels of *Owens*. This Court's primary focus in *Reed* was whether the petitioner's claim should be governed by the National Labor Relations Act § 10(b) statute of limitations or by state personal injury statutes. After concluding that the state personal injury statutes of limitations should apply, this Court, without further analysis, cited *Owens* and adopted the "residual or general" statute of limitations applicable to personal injury actions. *Id.* at 323, 326-27.

This Court has therefore applied residual or general statutes of limitation only to a few broad causes of action which could be analogized to more than one personal injury statute of limitations, and which encompass "numerous and diverse topics," each of which implicates a different set of personal injury statutes. *See Owens*, 488 U.S. at 250 n.12.

This action clearly does not fall within this narrow class of cases. Petitioners concede that ERISA § 502(a)(1)(B) benefit claims are analogous to contract actions, not personal injury actions. Moreover, once a state statute has been selected, it will apply to all such ERISA claims raised within that state. Unlike *Wilson v. Garcia*,

the facts upon which ERISA benefit claims are based are sharply circumscribed, and will not implicate multiple statutes of limitations depending on the facts alleged by plaintiffs.25/

III.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF PETITIONERS' CLAIMS FOR BREACH OF FIDUCIARY DUTY ON THE GROUND THAT PETITIONERS LACKED STANDING TO SUE AS "PARTICIPANTS" OR "BENEFICIARIES" BECAUSE THEIR BENEFIT CLAIMS WERE TIME-BARRED.

The parties to this action have not found another court of appeals or district court opinion deciding whether employees whose ERISA benefit claims are barred by the statute of limitations nonetheless have standing as participants or beneficiaries to allege a breach of fiduciary duty. The absence of precedent indicates how narrow and unimportant this question truly is. It may never arise again, a consideration that strongly argues against granting certiorari. If other circuit courts do confront this question in the future, there is every reason to believe that they will agree with the Eighth Circuit.

25/ There is also no inconsistency among the circuits with respect to ERISA benefit claims, unlike the situations presented in *Wilson*, *Owens* and *Reed*. *See Reed*, 488 U.S. at 323; *Owens*, 488 U.S. at 241-42; *Wilson*, 471 U.S. at 266. Every court of appeals that has considered which statute of limitations to apply to ERISA benefit claims has applied the most analogous state statute, and ultimately adopted a contract statute of limitations. *See supra* at 10, 20-21.

There is, in addition, no reason to question the Eighth Circuit's ruling. ERISA § 502(a)(2) and (a)(3), the statutory basis for petitioners' breach of fiduciary duty claims, allow "participants" or "beneficiaries" to bring civil actions for breach of fiduciary duties. ERISA defines a "participant" as an employee or former employee "who is or may become eligible to receive a benefit" from an ERISA plan. 29 U.S.C. § 1002(7). A "beneficiary" is a person designated by a participant, or by the terms of an employee benefit plan, "who is or may become entitled to a benefit" under the plan. 29 U.S.C. § 1002(8). Interpreting this statutory language, this Court has held that to be considered a "participant," a former employee must have "a colorable claim to vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989). To establish that "he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* at 117-118.

Petitioners cannot satisfy this test. Because they failed to bring suit within the time permitted by the statute of limitations, petitioners did not have and could not have a "colorable claim" that they "will prevail in a suit for benefits." Petitioners' claims for benefits are time-barred. Petitioners, therefore, were not and could not become "participants" or "beneficiaries" under the *Firestone* test, and lack standing to assert breach of fiduciary duty claims.

Although other courts of appeals have not considered this precise question, it has been well established both in *Firestone* and in numerous circuit court decisions that if plaintiffs are not entitled to receive

benefits, they are not participants or beneficiaries and have no standing to allege ERISA claims. *See, e.g., Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023 (9th Cir. 1995); *Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652 (3rd Cir. 1993); *Sallee v. Rexnord Corp.*, 985 F.2d 927 (7th Cir. 1993). This logic applies to all ERISA claims, including the breach of fiduciary duty claims alleged by petitioners.

Petitioners wrongly assume that the Eighth Circuit applied a state statute of limitations to bar federal ERISA claims, violating ERISA's preemption provision. Pet. 21-22. In adopting state statutes of limitations where Congress has failed to provide a limitations period, courts act as a matter of federal law. The statute of limitations that they derive may be borrowed from the states, but it is a federal limitations provision. Thus, ERISA's preemption clause, which preempts only state law, is not applicable.

Petitioners also err in arguing that the Eighth Circuit's standing decision was improper in light of the separate statute of limitations for breach of fiduciary duty claims. ERISA § 413, 29 U.S.C. § 1113. Before employees are permitted to assert any ERISA claim under § 502(a)(2) or (a)(3), including claims for breach of fiduciary duty, they must prove that they are "participants" or "beneficiaries." This is a threshold requirement, mandated by clear statutory language, which all employees must satisfy before asserting ERISA claims. Once that threshold is passed, courts will apply the 29 U.S.C. § 1113 statute of limitations to determine whether the participants have timely asserted their breach of fiduciary duty claims. In this case, petitioners failed to pass the threshold. They therefore cannot assert their claims.

Petitioners' final effort to salvage their breach of fiduciary duty claims is based upon an exception to the standing requirement recognized by the Eighth Circuit. Pet. 23-24. Under this exception, plaintiffs may allege ERISA claims, even if they are not participants, if they lost their participant status because of defendant's breach of fiduciary duty. *Id.* Petitioners claim that the Eighth Circuit wrongly concluded that they did not fall within that exception. *Id.* This argument is not worthy of review on a writ of certiorari since it is based upon the unique facts and circumstances of this case.[26/] The Eighth Circuit found that in this case, petitioners themselves, not Armco, were responsible for their loss of participant status. Pet. App. A-9 - A-10. The panel thus concluded that the standing exception does not apply here.[27/]

26/ The standing exception to which petitioners refer was established by the Eighth Circuit in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3771 (U.S. Apr. 24, 1995). As noted above, this Court has granted certiorari in *Howe* to consider questions unrelated to this standing exception. *See supra* at 7 n.9.

27/ Petitioners argue that Armco is responsible because Armco allegedly concealed the nature of its relationship with Reserve. Nothing, however, was hidden. Moreover, even if petitioners were unaware of Armco, they had two years to investigate their claims after their benefits stopped. Their failure to do so was their responsibility, not Armco's. *See* Pet. App. A-9 - A-10.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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